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No. 82-461

In the Supreme Court of the United States

October Term, 1982

PHILLIPS PETROLEUM COMPANY,
Petitioner,

vs.

KEATON G. DUCKWORTH, District Judge, 26th Judicial District, IRL SHUTTS, and ROBERT ANDERSON and BETTY ANDERSON, Individually, and as representatives of all royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds or royalties pursuant to Federal Power Commission Opinion Nos. 699, 699H, 749, 749C, 770, and 770A,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION

W. LUKE CHAPIN
(Counsel of Record)
CHAPIN, PENNY & GOERING
P. O. Box 148
Medicine Lodge, Kansas 67104
(316) 886-5611

ED MOORE
GINDER & MOORE
202 South Grand
Cherokee, Oklahoma 73728
(405) 596-2106

HAROLD GREENLEAF
SMITH, GREENLEAF & BROOKS
P. O. Box 296
Liberal, Kansas 67901
(316) 624-6266

Attorneys for Respondents

Date: October 15, 1982

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED

1. Can Phillips Petroleum Company, the defendant in a plaintiff class action, assert due process rights of nonresident plaintiff class members?

2. If so, does a state court violate the due process rights of plaintiff class members who are nonresidents of Kansas by including them in plaintiff class after they have been given first class mail notice and failed to file written exclusion?

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Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The Class Order of the trial court is as shown in the Petition, A2 to A9. The denial by the Supreme Court of Kansas of the Petition for Mandamus is as shown in the Petition, Page A1.

JURISDICTION

Although the Class Order of the trial court is not a final order and neither is the denial of Writ of Mandamus by the Supreme Court of Kansas a final order, this court may review due process rights of parties, in a proper action, pursuant to 28 U.S.C. Sec. 1257(3).

STATEMENT OF THE CASE

Phillips first attempted to use its royalty owners' money without payment of interest as set forth in *Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292 (1977), cert. denied, 434 U.S. 1068 (1978). That case will be referred to hereinafter as *Shutts I.* According to the Petition in this case, *Shutts II*, Phillips again withheld and used its royalty owners' money while various appeals from FERC rulings were pending and later paid out the monies without paying or offering to pay any interest for their use.

Action was originally filed in July, 1979, to include producers as well as royalty interest owners to whom Phillips made payment of suspended monies (see copy of Petition beginning at Appendix, Page A1 and copy of Plaintiffs' Motion to Certify the Class at A15) but the trial court excluded producers from the class and included only royalty owners and overriding royalty owners, just as in *Shutts I.* (See Class Order at Petition Appendix A2 to A9.)

Phillips did not attempt interlocutory appeal from the trial court's Class Order but, instead, attempted to use mandamus to compel the trial court to limit class members to residents of Kansas only.

This attempt has been made even though (1) there are many nonresidents of Kansas who own royalty interests under Kansas oil and gas leases; (2) plaintiff Shutts, a Kansas resident, owns royalty interests under Phillips leases in Texas and Oklahoma; and (3) the trial court required first class mail notice to all class members, which notice has been given. Copy of plaintiffs' Motion to Dismiss Petition for Writ of Mandamus in the Supreme Court of Kansas is attached at Appendix, page A21.

ARGUMENT

I. The Due Process Rights of Non-Kansas Members of the Plaintiff Class Cannot Be Properly Asserted by Phillips and the Fourteenth Amendment Issues Raised by Phillips Are Not Ripe for Review by This Court.

A. Phillips Cannot Represent Its Adversaries.

Phillips contends the Kansas state trial court lacks personal jurisdiction over nonresident members of the plaintiff class, and therefore the court cannot adjudicate their respective rights to interest against Phillips without violating their rights to due process. As a general rule, however, "one may not claim standing in this court to vindicate the constitutional rights of some third party." *Singleton v. Wulff*, 428 U.S. 106, 114 (1976), quoting *Barrows v. Jackson*, 346 U.S. 249, 255 (1953). The purpose behind this rule is twofold:

> "First, the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in court litigant is successful or not. . . Second, third parties themselves usually will be the best proponents of their own rights." (*Singleton v. Wulff*, 428 U.S. at 113-114.)

In this case, plaintiffs already have given first class mail notice to more than 33,000 class members, most of them being nonresidents of the State of Kansas. Phillips, in its Petition at Appendix A6 to A8 shows the notice that was given to the class members but for some reason does not show the exclusion form which was a crucial part of the notice. It is as follows:

REQUEST FOR EXCLUSION

to the Clerk of the Court:

The undersigned respectfully requests to be excluded from the plaintiff class members in this case in accordance with the terms of the Notice of Pendency of Class Action dated June 15, 1982.

Dated ....., 1982.

Send to:

Clerk of the Court
415 N. Washington
Liberal, Kansas 67901

Signature: .....

Pri. Name: .....

Address: .....

.....

Approximately 3,348 of the class members have signed and returned the exclusion form to the Clerk of the District Court of Seward County, Kansas.

Thus, a substantial number of the class members have exercised their right to exclude themselves from the action. The balance of the class members are in a direct adversary relationship to Phillips.

Even though Phillips paid out some of the suspense monies involved in this case more than five years ago, and even though *Shutts I* was decided by the Kansas court more than five years ago, there are no actions pending in any other state court or federal district court for the collection of interest on the suspense monies from Phillips. If Phillips royalty owners are to recover interest on suspense monies as they did in *Shutts I*, then this probably is the only case where there is any likelihood of their recovering such interest.

Phillips' argument in behalf of nonresident plaintiff class members, therefore, is of doubtful validity. Phillips by attempting to eliminate nonresident members of the

class is attempting to eliminate most of its liability. It is not really interested in the rights of nonresident plaintiff class members except to eliminate such liability. The members who have stayed in the class have stayed in after due notice and because they want to collect the interest which is due them. They are represented by the named plaintiffs and by attorneys for the plaintiff class, not by Phillips. Phillips should not be heard in this court as a representative of the due process rights of members of the plaintiff class.

Phillips claims that "nonresident plaintiffs have not chosen Kansas as the forum." (Petition, page 10.) Not so. Nonresident plaintiffs have chosen Kansas as the forum by electing to stay in the case rather than to exclude themselves.

Phillips, by seeming to argue the case as though the judgment were unfavorable to plaintiff class, attempts to present a hypothetical case that does not exist. Phillips is not arguing for nonresident class members but for itself. If the Kansas court follows the judgment in *Shutts I*, and it is presumed that it will, judgment granted to members of the plaintiff class will allow them everything that suit is filed to secure. It is far too tenuous to assume first, a dissatisfied class member exists; second, if he does exist, he will try to relitigate his claim, having secured by Kansas judgment all he could possibly obtain; and third, if he tries to relitigate the claim, the forum court will find he was not bound by the Kansas court judgment.

This brief represents both residents and nonresidents in opposition to the Petition for Certiorari. The nonresident members do not want to be excluded. They do not want Phillips arguing "for" them. They want to be left in the case and have the benefits of the judgment we anticipate they will obtain.

B. The Due Process Claims Raised by Phillips Are Not Ripe for Review by This Court. This Case Presents No Issue of Parallel or Conflicting Class or Individual Actions; No Collateral Attacks of an Unfavorable Final Adjudication; No Forum Shopping; No Disruption of Individual State Regulations or Administrative Procedures; No Deprivation of a Prospective Plaintiff's Right to Have His Claim Adjudicated in Another Forum or Under Another State's Laws.

The most that Phillips can allege at this point is that if the plaintiff class does not prevail and obtain judgment, then nonresident class members will have been deprived of their claims *against* petitioner without due process of law. If Phillips were really worried about prospective due process denials to plaintiff class, it could pay the claims and prevent the worry.

Speculative claims of future harm ought not to be addressed by this court until such harm occurs. (*Golden v. Zwickler*, 394 U.S. 103 (1969), particularly where such claims are based on issues of constitutional significance. (*Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341, 346-48 (1936).)

As discussed below, this court has ruled many times on the question of whether a judgment in a plaintiff class action would be binding upon class members who were not residents of the forum state. (See, *Hansberry v. Lee*, 311 U.S. 32 (1940); *Sovereign Camp of the Woodmen of the World v. Bolin*, 305 U.S. 66 (1938); *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921); *Hartford Life Insurance Co. v. Barber*, 245 U.S. 146 (1917); *Supreme Council of the Royal Arcanum v. Green*, 237 U.S. 531

(1915); *Hartford Life Insurance Co. v. Ibs*, 237 U.S. 662 (1915).) Each of those decisions arose within a firm factual framework, i.e., a class member seeking to enforce or attack a judgment in the court of a sister state, and in each case the due process issues were raised by a party whose rights had been adjudicated in his absence. However, it was held that such party was bound as a class member.

In the present posture of this case, the only issue is whether the due process rights of a third party would be violated by the mere act of a court denying a motion of the defendant not to certify as to nonresident members of the plaintiff class. No property right of any nonresident of Kansas class member has yet been affected; and no right could be affected unless the Kansas court renders an adverse judgment to the plaintiff class.

Accordingly, both because there is no present deprivation of any right of a plaintiff class member and also because Phillips lacks standing to argue the due process rights of its adversaries, this court should decline to review the constitutional question presented.

Phillips does business in Kansas and has been duly served with process in Kansas. No question is asserted as to the jurisdiction of the trial court or the Supreme Court over Phillips or the trial court's power to enforce a judgment against Phillips.

II. The Kansas Court's Decision to Include Non-Residents As Members of a Plaintiff Class Is Consistent With Established Law.

A. The Class Action Is a Recognized Exception to the Rule That a Court Cannot Bind Parties Not Personally Present.

Phillips argues that the nonresident plaintiffs this case have not taken any affirmative action to subn em-selves to the jurisdiction of the Kansas court.

This argument is contrary to the whole theory of F.R. Civ. P. 23 and K.S.A. 60-223, the Kansas statute which has been copied after the federal rule. Provisions in both the federal rule and the Kansas statute are practically the same pertaining to members electing to exclude themselves after proper notice. Phillips apparently is arguing that the "opt out" procedure as compared to the former "opt in" procedure is not proper.

The Kansas court in *Shutts I* (page 544) referred to the Federal Rules of Civil Procedure as amended in 1966 and pointed out that such rules allow judgment to bind all class members unless a member affirmatively "opted out" of the litigation at its commencement. The same is true of the Kansas rules.

The propriety of binding absent class members outside the jurisdiction of the forum court was decided long ago. In *Hansberry v. Lee*, 311 U.S. 32, this court found:

> "It is a principle of general application in Anglo-American jurisprudence that one is not bound by judgment in personam in a litigation in which he is not designated as a party. . .
>
> "To these general rules there is a recognized exception that, to an extent not precisely defined by judicial

> opinion, the judgment in a 'class' or 'representative' suit, . . . may bind members of the class or those represented who were not made parties to it. . .
>
> "Courts are not infrequently called upon to proceed with causes in which the number of those interested in the litigation is so great as to make difficult or impossible the joinder of all *because some are not within the jurisdiction* or because their whereabouts is unknown . . ." 311 U.S. at 40-42. (Emphasis supplied.)

To bind absent class members, the due process protections of notice and representation must be afforded. The clearest statement of those requirements is in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950). To be bound by a final judgment in a representation suit, one must be "informed that the matter is pending and (have the opportunity) to choose for himself whether to appear or default, acquiesce or contest." (339 U.S. at 314, 70 S. Ct. at 657.) The kind of notice mandated in *Mullane* is exactly the kind of notice plaintiff class members have received in this case. The class members' contacts with the forum are as irrelevant here as were beneficiaries' contacts with the State of New York in *Mullane*.

Adequate notice has been provided in this case and Phillips challenges neither the method of notice nor the form or quality of representation.

Professor Moore in his treatise, *3D Moore's Federal Practice*, §23.11(5) in discussing Federal Rules of Civil Procedure 23 indicates:

> "The fact that members of the class are beyond the territorial limits of the class suit court is immaterial as to the binding effect of the class suit judgment."

The Restatements are also in agreement. The Restatement of Judgments states:

> "Section 26: Representative or Class Actions.
>
> "Where a class action is properly brought by or against members of a class the court has jurisdiction by its judgment to make a determination of issues involved in the action which will be binding as res judicata upon other members of the class, although such members are not personally subject to the jurisdiction of the court."

See also, note, "Consumer Class Action of a Multistate Class: A Problem of Jurisdiction," 25 Hastings L. J. 1411, 1432, 1435 (1974); and 30A C.J.S., *Equity*, §1456(4) at 124.

This court has implicitly concluded class actions with a multi-state class can and should be brought in state courts. In *Snyder v. Harris*, 394 U.S. 332, this court noted class actions premised on *diversity* of citizenship can "most appropriately be tried in state court" (Id. at 341) and plaintiffs "had nothing to fear from trying the lawsuit in the courts of their own state." (Id. at 340.) This led the court in *Shutts I* to question at page 545: "If the state courts cannot maintain class action suits with nonresident plaintiffs, can the 'small man' find legal redress in our modern society?"

In the Hastings Law Journal article, *supra*, it is said at page 1435:

> "It is . . . the suggestion of this note that by adhering to the same jurisdictional standards of due process required on the federal level, state courts can exercise jurisdiction over a class action regardless of the citizenship of the class members."

B. The Minimum Contacts Test Is Inapplicable to Plaintiff Class Actions.

The "minimum contacts" standards sought to be applied by Phillips to the members of a plaintiff class was developed to assure that the maintenance of a lawsuit "does not offend 'traditional notions of fair play and substantial justice.'" (*International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).) Thus, "minimum contacts" are required to protect the defendant "against the burdens of litigating in a distant or inconvenient forum." (*World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 292 (1980).) As the Kansas Supreme Court has ruled in *Shutts I*, this consideration is inapplicable to class actions.

In contrast to an individual defendant, who must choose between incurring considerable expense and inconvenience if he appears in the distant forum, or judgment by default if he stays away, an adequately represented class member need not travel to the distant forum in order to insure that his claim is effectively prosecuted. Because absent class members are not formal parties to the litigation, they are not subject to certain ancillary risks such as liability for costs and attorneys' fees in the event of a judgment adverse to the class.

Class members in this case have had the opportunity to opt out and many of them have "opted out".

Judge Morris E. Frankel said:

> "If all the pertinent criteria are fairly satisfied, I believe we'll discover that the preliminary shock of 'binding' absent people will subside or disappear and that the intended functioning of the (class action) rule . . . actually promotes essential fairness and justice no less than the secondary goal of judicial efficiency." (43 F. R. D. 45, 46.)

Separate suits in each of the states where class members reside would be an extraordinarily inefficient, expensive and burdensome method of proving the liability. Phillips is merely attempting to eliminate or diminish its liability through a subterfuge.

The extension of the standard applied to defendants of "minimum contacts" to plaintiff class members or, for that matter, any requirement of contacts with the forum other than the sharing of common interests with an adequate representative who is properly before the forum, is both unprecedented by any decision of this court and contrary to *Hansberry v. Lee, supra.* By their very nature, class actions must proceed in the absence of most class members. (*Schlosser v. Allis Chalmers Corp.*, 86 Wis. 2d 226, 241-242, 271 N. W. 2d 879, 886-887 (1978).) This principle was well established by this court more than 100 years ago in *Smith, et al. v. Swormstedt, et al.*, 57 U.S. (16 How.) 288, 301-303 (1853). If the class member is absent, it makes no difference whether he is absent within or outside the forum state—but rather whether his interests have been adequately represented.

Phillips places unfounded reliance on *Rush v. Savchuk*, 444 U.S. 320 (1980); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945); and *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977) and similar cases. Not one of those cases, all of which concerned jurisdiction over nonresident *defendants*, in any way diminishes the "recognized exception" to the requirement of in personam jurisdiction in plaintiff class actions.

C. Comparison With Gillette Case.

Phillips argues that this case is comparable with *Gillette Company v. Miner*, No. 81-1493, 102 S. Ct. 1767 (1982) in this court. *Shutts II* in some respects is similar. It involves nonresident plaintiff class members and therefore has similar issues.

However, *Gillette* involves a promotional scheme wherein it offered a $7.95 prize for purchasing certain items, where *Shutts II* involves substantial interest which is due to plaintiff royalty owners for use by Phillips of their money. In *Gillette*, the Petition is from a ruling of the Illinois Supreme Court reversing the Circuit Court of Appeals and the trial court in denying certification of nonresident members of plaintiff class, while in *Shutts II* the class has been certified by the trial court to include nonresident members, the ruling has been upheld by the Supreme Court in its denial of mandamus to the trial court, and Phillips now is attempting to overturn both the ruling of the trial court and the Supreme Court of Kansas.

In addition, the Kansas court in *Shutts I* considered the common fund cases and held them to be analogous to this case. (See *Hartford Life Ins. Co. v. Ibs* and similar cases cited previously in this brief at pages 6-7.)

The Kansas court in *Shutts I*, pages 552-553, said:

> "The 'common fund' cases, which seem to be universally accepted, are closely analogous to the case at bar. Here Phillips filed a corporate undertaking guaranteeing to refund any or all portions of 'FPC suspense money' with interest which it collected and held pending FPC determination of the lawful gas rates in the Hugoton-Anadarko area rate proceedings...

"Had Phillips put the 'suspense royalty' into a common trust fund, separate from its operating funds, to be used solely to pay either the pipeline companies or the gas royalty owners once the FPC ultimately decided the rate increase question, this case would dovetail nicely into the 'common fund' cases. Instead Phillips commingled the 'suspense royalty' to fulfill its business obligation. In this matter the 'suspense royalty' which never did or could belong to Phillips, enriched Phillips at the expense of the royalty owners. To hold that Phillips' act of using the money for business purposes and not putting it into a separate corporate account, takes this case out of the 'common fund' category would reward Phillips' action at the expense of innocent gas royalty owners." Citing *Perlman v. First National Bank of Chicago,* 15 Ill. App. 3d 784, 305 N. E. 2d 236 which held:

". . . There seems no basis in law or logic for permitting a class action against an individual who has sequestered all money wrongfully acquired but denying one against an individual who has commingled it with his other assets."

Phillips concedes that the "common fund" cases are correct holdings, but attempts to distinguish the facts. Actually, the facts cannot be successfully distinguished and it is anticipated that the Kansas court will correctly order a common interest fund to be paid over to Phillips royalty owners in *Shutts II* just as it did in *Shutts I.*

Although the Kansas resident royalty owners under Phillips' leases may be comparatively small in number, Kansas with its Hugoton Gas Field and other gas producing areas, has substantial interest in royalty owners receiving interest on suspense royalties, and the common fund

analogy applies. (See plaintiffs' Motion to Dismiss Petition for Writ of Mandamus in the Kansas Supreme Court, hereto attached at Appendix pages A21 to A26.)

III. Answers to Phillips' Other Claims

Phillips argues that state court opinions are in conflict on the question of jurisdiction over plaintiff classes because there is one Pennsylvania case and one New Jersey case opposed to the *Shutts I* opinion. There is no contradiction of the holding of these state courts as to the law. Both the Pennsylvania and New Jersey cases were discussed in *Shutts I*, pages 549 to 551, and held inapplicable for reasons there stated.

It is apparent that the Pennsylvania statutory language in *Klemow v. Time, Inc.*, 466 Pa. 189, 352 A.2d 12, cert. denied, 429 U.S. 828, is completely at variance with the Kansas statutory language. The Pennsylvania statute as to a class action prohibits a judgment from imposing personal liability on anyone not a party thereto.

As to the New Jersey case of *Feldman v. Bates Mfg. Co.*, 143 N.J. Super. 84, 362 A.2d 1177, the Kansas Supreme Court in *Shutts I* disposed of *Feldman* as follows:

> "An excellent example of a factual situation in which a trial judge applying our class action statute should deny certification of a class action, where nonresident plaintiff class members are involved, is presented in *Feldman v. Bates Mfg. Co., supra.*" (*Shutts I*, page 557.)

Phillips apparently ignores the fact that Shutts has royalties both in Texas and Oklahoma, the largest states in properties and residences of parties involved, and Andersons also have royalties in Oklahoma.

Phillips claims it "could not have reasonably anticipated being haled into the Kansas courts to defend claims of nonresidents arising from leases located in other states." *Shutts I*, a case in which Phillips paid interest on FPC suspense royalties after certiorari was denied adequately disposes of that contention. After that decision Phillips should have voluntarily paid all of its royalty owners interest on monies suspended. By flagrantly violating a state Supreme Court order, Phillips should have had every reasonable expectation the courts of that state would not countenance such action.

Phillips has adopted a theory of "divide and conquer" in trying this lawsuit. In order to decrease liability, Phillips would like to limit the lawsuit either to the named plaintiffs only, or to the named plaintiffs and their colessors. Failing that, Phillips would like to limit it to the so-called "designated area" of two counties in Oklahoma and two counties in Texas where named plaintiffs have their royalties. Failing that, they would like to limit it to residents of Kansas only. The Kansas trial court and Supreme Court have correctly included all of Phillips gas royalty owners and overriding royalty owners to whom they accounted.

It has not yet been determined in *Shutts II* that Phillips owes interest, but the subject is adequately covered in *Shutts I*, where it was found and held that:

> "What is significant is these gas royalties suspense monies never did or could belong to Phillips." (*Shutts I*, page 560.)
>
> "Phillips made substantial profit during the years 1961-1973. The net profit ranged from $113,000,000.00 to $132,000,000.00 during the period in question and stock-

holders' equity increased from $1,205,000,000.00 in 1962 to over $1,749,000,000.00 in 1971." (*Shutts I*, page 560.)

". . . We do not believe that Phillips may enrich itself in the absence of any contractual sanction or seize upon the procedural complexities of the FPC to avoid responsibility for an appropriate measure of damages, expressed in terms of interest." (*Shutts I*, page 561.)

"We are dealing with 'suspense royalty' which never could or would belong to Phillips. This was the equivalent of a common fund which was accumulated and used by Phillips. . . Phillips was a stakeholder who retained the fund which it used for its own benefit. . . If the FPC had denied all of Phillips' rate increase applications, Phillips would have had to pay 7% and later 8% interest to the gas purchasers pursuant to its express agreement and corporate undertaking with the FPC. Thus, Phillips has made an express agreement, with regard to the monies accumulated in the suspense fund by Phillips, to pay 7% and later 8% interest, as ultimately determined by the FPC Opinion No. 586." (*Shutts I*, page 564.)

The anticipated award of interest involves no federal question and will be eminently fair and just.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

W. LUKE CHAPIN
(Counsel of Record)
CHAPIN, PENNY & GOERING
P. O. Box 148
Medicine Lodge, Kansas 67104
(316) 886-5611

ED MOORE
GINDER & MOORE
202 South Grand
Cherokee, Oklahoma 73728
(405) 596-2106

HAROLD GREENLEAF
SMITH, GREENLEAF & BROOKS
P. O. Box 296
Liberal, Kansas 67901
(316) 624-6266
Attorneys for Respondents

Date: October 15, 1982

APPENDIX

No. .....

IN THE DISTRICT COURT OF SEWARD COUNTY, KANSAS

IRL SHUTTS and ROBERT ANDERSON and BETTY ANDERSON, Individually, and as representatives of all producers and royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds or royalties pursuant to Federal Power Commission Opinions Nos. 699, 699H, 749, 749C, 770 and 770A,
Plaintiffs,

vs.

PHILLIPS PETROLEUM COMPANY,
Defendant.

(Civil Class Action under K.S.A. Chapter 60)

PETITION

COME NOW the plaintiffs and allege and show to the court:

1) Plaintiff Irl Shutts is a resident of Barber County, Kansas, and his post office address is Sun City, Kansas. Plaintiffs Robert Anderson and Betty Anderson are residents of Texas County, Oklahoma, and their post office address is Box 1113, Guymon, Oklahoma 73942. Defendant is a corporation doing business in Seward County, Kansas. Defendant is referred to as Phillips in this Petition and such designation is intended to include the defendant corporation and any predecessor corporations in making gas payments hereinafter mentioned.

2) Plaintiffs are Phillips' royalty owners and are members of a class composed of all producers and royalty owners to whom Phillips made payment of suspended proceeds or royalties pursuant to Federal Power Commission Opinions Nos. 699, 699H, 749, 749C, 770 and 770A and the class may be divided into subclasses as follows:

(A.) A subclass consisting of producers and royalty owners who received payment from Phillips on or about December, 1975, of gas price increases pursuant to FPC Opinions 699 and 699H theretofore "suspended" by Phillips. (See Exhibit "1" hereto attached and made a part hereof.)

(B.) A subclass consisting of producers and royalty owners who received payments from Phillips on or about September, 1977, and March, 1978, of gas price increases pursuant to FPC Opinions Nos. 770 and 770A theretofore "suspended" by Phillips. (See Exhibits "2" and "3" hereto attached and made a part hereof.)

(C.) A subclass consisting of producers and royalty owners who received payment from Phillips in about September, 1978, of gas price increases pursuant to FPC Opinions Nos. 749 and 749C theretofore "suspended" by Phillips. (See Exhibits "4", "5" and "6" hereto attached and made a part hereof.)

3) Plaintiffs bring this action individually and as representatives of all of that class of producers and royalty owners referred to in Paragraph 2 above. Plaintiffs are informed and believe that the class which they seek to represent is composed of over 10,000 members, whose names and addresses are known to Phillips, but not to plaintiffs, and their number makes it impracticable to join all of them in this action. Plaintiffs are informed and believe that formerly Phillips paid the plaintiffs and other

class members all of their proportionate share of the proceeds of gas produced and sold; that beginning several years ago, and just when plaintiffs do not know, Phillips began receiving higher prices for the gas sold, but continued paying the class members at the old price. Plaintiffs are informed that Phillips commingled such so-called "suspended" money with its own money and invested and used the same for its own purposes. Phillips has not paid the plaintiff class or subclasses or anyone else for the use of such "suspended" monies held by Phillips during these periods of time. The Federal Power Commission issued its Opinion No. 699 on June 21, 1974, No. 699H on December 4, 1974, No. 749 on December 2, 1975, No. 749C on July 19, 1976, No. 770 on July 27, 1976, and No. 770A on November 5, 1976, which approved price escalations in rates for gas paid to Phillips but Phillips did not pay out to the class members until dates as above stated in Paragraph 2, the last date being September, 1978. The total amount of class members' money so held and finally paid over to the class members is not known to plaintiffs, but is known to defendant and is estimated by plaintiffs to be over $1,000,000.00.

4) The plaintiffs and other members of the class are entitled to recover from Phillips for its use of the money on any one or more of the following theories or for the following reasons:

(A.) The doctrine of unjust enrichment. (*Shutts v. Phillips Petroleum Company*, 222 Kan. 527, 567 P.2d 1292, Syl. 19; U. S. Cert. denied 434 U. S. 1068, rehearing denied 435 U. S. 961.)

(B.) The equitable principle that when one makes actual use of money belonging to another, it is required to pay interest on the money so retained and used. (*Shutts*, supra, Syl. 20.)

(C.) Equitable principles require that class members receive the same treatment as gas purchasers as to interest required by the Federal Power Commission on "FPC suspense monies". (*Shutts*, supra, Syl. 21.)

(D.) Phillips made an *express* agreement by filing corporate undertaking with the Federal Power Commission to pay interest on the "suspended" proceeds. (*Shutts*, supra, P. 564.)

5) The question of law and fact involved in this action is common to all members of the class and subclasses identified above and is as follows:

"Should Phillips pay interest to class members on such 'suspended' monies at the rate of 7% per annum to October 10, 1974, and at the rate of 9% per annum thereafter until paid over to class members, all in accordance with FPC Order No. 513-A, issued July 14, 1976?"

6) The claim of these plaintiffs is typical of all claims of the general class identified above and of all three subclasses and plaintiffs can and will fairly and adequately protect the interests of such class and subclasses and all members of the class and the subclasses.

7) Prosecution of separate actions by individual members of the class and subclasses identified above would result in multiple lawsuits; would create a risk of inconsistent or varying adjudications concerning individual members of the class and subclasses and could establish incompatible standards of conduct for defendant.

8) The amount of interest due these plaintiffs from defendant is probably less than $1,000.00 each and it is believed and so alleged by the plaintiffs that many of the

members of the class and subclasses identified above have small amounts at stake. As a practical matter, many members of the class and subclasses would have no remedy if this action could not proceed as a class action.

9) Phillips has systematically and purposely withheld the money due the plaintiffs and other members of the class and subclasses and has used the money for its own purposes. Such action by Phillips without compensation to the class members for the use of the money has affected all members of the class in exactly the same way, except as to the amount due each, which can be easily computed through Phillips' records and computers. A class action is the only suitable means of redress to the plaintiffs and other class members.

10) The essential question at issue is the matter of collection of interest on money used by Phillips for several years and there is a community of interest among all members of the class and subclasses in this question and in the remedy. There is a "common fund" set up as to each of the subclasses subject to recovery in this action. The members of the class and subclasses are made up of residents and nonresidents of the State of Kansas, the above FPC opinions being nationwide gas pricing regulations. Class members are those affected by the national rates as set up by the FPC opinions above mentioned as distinguished from rates previously set up by FPC which affected only the individual rate making areas as defined by FPC, such as the Hugoton-Anadarko area.

WHEREFORE, plaintiff prays for an order of the court finding that this action is maintainable as a class action; for judgment in favor of plaintiff and other members of the

class for interest, costs of this action, attorneys' fees and expenses, and for all other proper relief.

Ginder, Moore & McLaughlin
Attorneys at Law
202 S. Grand
Cherokee, OK 73728

Chapin, Penny & Goering
Attorneys at Law
Chapin Building
Medicine Lodge, KS 67104

By /s/ W. Luke Chapin
Attorneys for Plaintiffs

Exhibit "1"

PHILLIPS PETROLEUM COMPANY

NOTICE CONCERNING PAYMENTS UNDER FEDERAL POWER COMMISSION OPINION NO. 699

On October 14, 1975, the United States Court of Appeals for the Fifth Circuit issued its opinion in *Shell, et al. v. FPC* (No. 74-3330, et al.), affirming the Commission's Opinion Nos. 699 and 699-H. As you were advised by an earlier notice, this case involved challenges to a number of aspects of Opinion Nos. 699 and 699-H issued by the Federal Power Commission on June 21, 1974 and December 4, 1974, respectively. In its opinions the Commission established a nationwide just and reasonable rate for sales in interstate commerce of gas developed or contracted after January 1, 1973.

Our prior notice advised that because of the judicial challenges to the validity of those rates, Phillips would con-

sider as firm proceeds only 35¢ of the nationwide new gas rate with the balance being held pending judicial review unless a satisfactory indemnity was executed.

Although the action of the Fifth Circuit in affirming Opinion Nos. 699 and 699-H is subject to further review by the United States Supreme Court, Phillips has determined that it will make payment on the basis of the full amount collected under those opinions for natural gas covered hereby. Such increased payments are made upon the express condition and understanding that in the event the Supreme Court reverses or modifies the opinion of the Fifth Circuit in such a manner as to disallow all or a portion of the collections made under Opinion Nos. 699 and 699-H, recipients of such increases will make prompt refund to Phillips of all disallowed portions. If refund thereof is not made within thirty (30) days from the date of Phillips' notice advising that refund is due, then Phillips shall recoup the amount of such refund from future payments.

Any party who does not desire to receive such increased amounts under the above conditions should return the payment enclosed herewith with written advice that payment of such sums covered by Opinion No. 699 and 699-H is not desired.

PHILLIPS PETROLEUM COMPANY
EXPLORATION & PRODUCTION
SETTLEMENTS DIVISION—628 FPB
BARTLESVILLE, OKLAHOMA 74004

December 1975

Exhibit "2"

PHILLIPS PETROLEUM COMPANY

NOTICE CONCERNING FEDERAL POWER COMMISSION OPINIONS NO. 770 AND 770A COVERING INTERSTATE SALES OF GAS FROM WELLS COMMENCED AFTER JANUARY 1, 1973

On August 17, 1977, the United States Court of Appeals for the District of Columbia Circuit denied petitions for rehearing of its opinion issued on June 16, 1977, in *The Second National Natural Gas Rate Case* (*American Public Gas Association, et al. v. FPC,* No. 76-2000, et al.) affirming the Commission's Opinions No. 770 and 770A. As you were advised by an earlier notice, this case involved a number of challenges to a number of aspects of the Commission's opinion prescribing nationwide just and reasonable rates for sales in interstate commerce of gas from wells commenced after January 1, 1973.

Our prior notice advised that because of judicial challenges to the validity of those rates, Phillips would suspend payment of amounts collected under Opinions 770 and 770A which exceed the "new gas" rate in effect prior to Opinions 770 and 770A pending judicial review unless a satisfactory indemnity was executed.

Although the action of the D. C. Circuit in affirming Opinions 770 and 770A is subject to further review by the United States Supreme Court, Phillips has determined that it will commence payment on the basis of the full amount collected under those opinions for natural gas covered thereby. Such increased payments are made upon the express condition and understanding that in the event the Supreme Court reverses or modifies the opinion of the

D. C. Circuit in such a manner as to disallow all or a portion of the collections made under Opinions No. 770 and 770A, recipients of such increases will make prompt refund to Phillips of all disallowed portions. If refund thereof is not made within thirty days from the date of Phillips' notice advising that refund is due, then Phillips shall recoup the amount of such refund from future payments.

Any party who does not desire to receive such increased amounts under the above conditions should forthwith so advise Phillips. In the absence of such advice Phillips will presume acceptance of the above procedure and will commence payments accordingly.

SEPTEMBER 1977

PHILLIPS PETROLEUM COMPANY
EXPLORATION & PRODUCTION
SETTLEMENTS SECTION, 642 FPB
BARTLESVILLE, OKLAHOMA 74004

Exhibit "3"

PHILLIPS PETROLEUM COMPANY
NOTICE CONCERNING FEDERAL POWER
COMMISSION OPINIONS NO. 770 AND 770A
COVERING INTERSTATE SALES OF GAS FROM
WELLS COMMENCED AFTER JANUARY 1, 1973

You were advised by notice dated September 1977, of the action of the United States Court of Appeals for the District of Columbia Circuit affirming Federal Power Commission Opinions 770 and 770A which prescribed nationwide just and reasonable rates for sales in interstate commerce of natural gas from wells commenced after Jan-

uary 1, 1973. On March 6, 1978 the United States Supreme Court declined to review the opinion of the D. C. Circuit.

The enclosed check represents payments on the basis of the full amount collected under those opinions for natural gas covered thereby.

PHILLIPS PETROLEUM COMPANY
EXPLORATION & PRODUCTION
SETTLEMENTS SECTION, 642 FPB
BARTLESVILLE, OKLAHOMA 74004

March, 1978

Exhibit "4"

NOTICE CONCERNING FEDERAL POWER COMMISSION OPINIONS NO. 749 and 749C COVERING INTERSTATE SALES OF GAS FROM WELLS COMMENCED PRIOR TO JANUARY 1, 1973, UNDER CONTRACTS EXECUTED PRIOR TO JANUARY 1, 1973

The following notice is directed to all producers who sell gas to Phillips Petroleum Company under percent of proceeds type contracts executed prior to January 1, 1973, from wells commenced prior to January 1, 1973, and to all royalty owners to whom payments are made for gas produced from wells commenced prior to January 1, 1973, and sold under contracts executed prior to January 1, 1973.

In our notice of April 1976, we advised that in Opinion No. 749 the Federal Power Commission established a single nationwide rate applicable to gas sold in interstate commerce from wells commenced prior to January 1, 1973, under contracts executed prior to January 1, 1973. This

new rate is applicable to Phillips' sales of such gas for resale in interstate commerce. Opinion No. 749 prescribed a rate to be applicable for the period from January 1, 1976 to July 1, 1976 and an increase therefrom to be applicable on and after July 1, 1976.

On July 19, 1976, the Federal Power Commission issued Opinion No. 749C denying rehearing. A petition for review of Opinion No. 749C has been filed in the United States Court of Appeals for the Fifth Circuit.

Although the Commission's action is under judicial review and therefore not final, Phillips has determined that it will make payment for the period between January 1, 1976 and July 1, 1976, on the basis of the full amount collected under Opinion No. 749 for that period. Payment subsequent to July 1, 1976 will be made on this same basis and that portion of its settlement payments attributable to the increase prescribed by Opinion No. 749 for the period subsequent to July 1, 1976, will be suspended pending final action by the Federal Power Commission and judicial determination of the applicable rates.

The payments being made under Opinion No. 749 are made upon the express condition and understanding that in the event the Federal Appeals Court reverses or modifies Opinion No. 749 in such a manner as to disallow all or a portion of the collections made thereunder, recipients of such increases will make prompt refund to Phillips of all disallowed portions. If refund thereof is not made within 30 days from the date of Phillips' notice advising that refund is due, then Phillips shall recoup the amount of such refund from future payments. With respect to that portion of the Opinion No. 749 rates applicable to the period subsequent to July 1, 1976, payment of which Phillips will suspend, producers and royalty owners desir-

ing to receive payments computed currently on the full sums being collected by Phillips may arrange to do so by furnishing Phillips acceptable indemnity to cover their proportionate part of any refunds which ultimately may be required, together with any applicable interest charges.

September 1976

PHILLIPS PETROLEUM COMPANY
EXPLORATION & PRODUCTION
SETTLEMENTS DIVISION--628 FPB
BARTLESVILLE, OKLAHOMA 74004

Exhibit "5"

NOTICE CONCERNING FEDERAL POWER COMMISSION OPINIONS NO. 749 AND 749C COVERING INTERSTATE SALES OF GAS FROM WELLS COMMENCED PRIOR TO JANUARY 1, 1973, UNDER CONTRACTS EXECUTED PRIOR TO JANUARY 1, 1973

The following notice is directed to all producers who sell gas to Phillips Petroleum Company under percent of proceeds type contracts executed prior to January 1, 1973, from wells commenced prior to January 1, 1973, and to all royalty owners to whom payments are made for gas produced from wells commenced prior to January 1, 1973, and sold under contracts executed prior to January 1, 1973.

As you are aware from our notice of September, 1976, the Federal Power Commission's Opinions No. 749 and 749C which prescribed rates for such natural gas was appealed to the United States Court of Appeals for the 5th Circuit. As a result of the pendency of that appeal, Phillips suspended that portion of its settlement payments

attributable to the increase prescribed by Opinion No. 749 for the period subsequent to July 1, 1976, and offered to make payment thereof only upon receipt of an acceptable indemnity.

In view of the action of the United States Supreme Court on March 6, 1978, denying a petition for writ of certiorari for review of the D. C. Circuit Court opinion affirming the Commission's Opinions No. 770 and 770A prescribing nationwide rates for gas from wells commenced *after* January 1, 1973, Phillips has determined that it will commence payment on the basis of the full amount collected under Opinions No. 749 and 749C for natural gas covered thereby. Since review of Opinions No. 749 and 749C is still pending, such increased payments are made upon the express condition and understanding that in the event the Court reverses or modifies the opinion of the Commission in such a manner as to disallow all or a portion of the collections made under Opinions No. 749 and 749C, recipients of such increases will make prompt refund to Phillips of all disallowed portions. If refund thereof is not made within thirty days from date of Phillips' notice advising that refund is due, then Phillips shall recoup the amount of such refund from future payments.

Any party who does not desire to receive such increased amounts under the above conditions should forthwith so advise Phillips. In the absence of such advice Phillips will presume acceptance of the above procedure and will commence payments accordingly.

March, 1978

PHILLIPS PETROLEUM COMPANY
EXPLORATION & PRODUCTION
SETTLEMENTS SECTION 642 FPB
BARTLESVILLE, OKLAHOMA 74004

Exhibit "6"

NOTICE CONCERNING FEDERAL POWER COMMISSION OPINIONS NO. 749 AND 749C COVERING INTERSTATE SALES OF GAS FROM WELLS COMMENCED PRIOR TO JANUARY 1, 1973, UNDER CONTRACTS EXECUTED PRIOR TO JANUARY 1, 1973

The following notice is directed to all producers who sell gas to Phillips Petroleum Company under percent of proceeds type contracts executed prior to January 1, 1973, from wells commenced prior to January 1, 1973, and to all royalty owners to whom payments are made for gas produced from wells commenced prior to January 1, 1973, and sold under contracts executed prior to January 1, 1973.

As you are aware from our notice of September, 1976, the Federal Power Commission's Opinions No. 749 and 749C which prescribed rates for such natural gas was appealed to the United States Court of Appeals for the 5th Circuit. As a result of the pendency of that appeal, Phillips suspended that portion of its settlement payments attributable to the increase prescribed by Opinion No. 749 for the period subsequent to July 1, 1976, and offered to make payment thereof only upon receipt of an acceptable indemnity.

On April 18, 1978 the 5th Circuit issued its decision affirming the action of the Commission in issuing Opinion No. 749 and 749C. A Conditional Petition for Writ of Certiorari was filed with the United States Supreme Court; however, on August 8, 1978, that Petition was voluntarily dismissed.

The rates prescribed by Opinion No. 749 and 749C having thus become final and no longer subject to judicial review, Phillips has commenced payment on the basis of the full amount collected thereunder for natural gas covered there-

by. The check enclosed herewith represents payment on this basis.

September, 1978

PHILLIPS PETROLEUM COMPANY
EXPLORATION & PRODUCTION
SETTLEMENTS SECTION, 642 FPB
BARTLESVILLE, OKLAHOMA 74004

No. 79C113

IN THE
DISTRICT COURT OF SEWARD COUNTY, KANSAS

IRL SHUTTS and ROBERT ANDERSON and BETTY ANDERSON, Individually, and as representatives of all producers and royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds or royalties pursuant to Federal Power Commission Opinions Nos. 699, 699H, 749, 749C, 770 and 770A,
Plaintiffs,

vs.

PHILLIPS PETROLEUM COMPANY,
Defendant.

PLAINTIFFS' MOTION TO CERTIFY AS A CLASS ACTION

COME NOW the above named plaintiffs and move the court to certify the above entitled action as a class action wherein plaintiffs represent all that class of producers and royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds or royalties pursuant to Federal Power Commission Opinions Nos. 699,

699H, 749, 749C, 770 and 770A. In support of this motion, plaintiffs make a part hereof the pleadings, defendant's answers to plaintiffs' interrogatories and defendant's answers to plaintiffs' requests for admissions; and further state as follows:

1) The proposed class consists of the following subclasses:

a. A subclass consisting of producers and royalty owners who received payment from Phillips of suspended monies pursuant to FPC Opinions 699 and 699H, 23,858 checks having gone out to them.

b. A subclass consisting of producers and royalty owners who received payments from Phillips pursuant to Opinions Nos. 749 and 749C theretofore suspended by Phillips, total number of checks going out to producers and royalty owners being approximately 23,500 checks.

c. A subclass consisting of producers and royalty owners who received payment from Phillips pursuant to FPC Opinions No. 770 and 770A theretofore suspended by Phillips, there having been more than 16,157 checks gone out to such producers and royalty owners.

2) Phillips admits receiving money at increased rates which was subject to being refunded to gas purchasers, with interest, to the extent the Federal Power Commission did not approve such increased rates and admits receiving FPC suspense monies not currently paid to its royalty owners and producers but eventually paid to its royalty owners and producers; Phillips admits that it did not at any time pay any interest on such money that was eventually paid over to gas royalty owners and producers to whom it accounted. Phillips further admits that

the total monies paid over to its producers and royalty owners under the various subclasses was as follows:

a. Under 699 and 699H, total payment of approximately $13,868,500.00.

b. Under Opinions Nos. 749 and 749C, total payments of approximately $4,554,700.00.

c. Under Opinions 770 and 770A, total payments of approximately $18,501,200.00.

3) Phillips further admits that the period of suspension of such royalties and suspended income as to each of the opinions is as follows:

a. As to Opinions Nos. 699 and 699H:

Suspended July, 1974, through September, 1975;

Payments made December, 1975, and January, February, March, May, July and December, 1976.

b. As to Opinions Nos. 749 and 749C:

Suspended January, 1976, through February, 1978;

Payments made in September and November, 1976; and in September, October and December, 1978; and in March, 1979.

c. As to Opinions Nos. 770 and 770A:

Suspended August, 1976, through July, 1977;

Payments made March and December, 1978, and in March, 1979.

Therefore, the only questions of law and fact are common to the entire class of gas royalty owners and producers to whom such payments were made on a nationwide basis, pursuant to the above mentioned FPC Opinions, all of

which were nationwide in their effect; and those questions are as follows:

a. Does Phillips owe interest on such monies held and used by Phillips and at what rate of interest?

Or

b. Does Phillips owe damages in the form of a share of its profits for the use of such money and if so, in what amount or at what rate of interest?

4) The claims of plaintiffs Shutts and Anderson for interest as disclosed by their Petition are typical of the claims of all members of the class of producers and gas royalty owners above referred to. All other Phillips gas royalty owners and producers have similar claims for interest, the only difference being in the amount of royalties or suspense monies to which the same apply and the time for which the interest should be computed. In other words, the only difference is in mathematical or arithmetical computations.

5) Plaintiffs are adequately represented by counsel who can and will represent the entire class, such counsel being the firm of Ginder & Moore, Cherokee, Oklahoma, and Chapin, Penny & Goering, Medicine Lodge, Kansas, and further qualifications will be furnished if requested by defendant or the court.

6) The foregoing constitute the prerequisites of Subdivision (a) of K.S.A. Supp. 60-223.

7) In addition:

a. The prosecution of separate actions by Phillips' gas royalty owners and producers to whom they account would create a risk of "(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible stan-

dards of conduct for the parties opposing the class (Phillips), or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests. . ." (K.S.A. Supp. 60-223(b)(1)); and

b. "The party opposing the class (Phillips) has acted or refused to act on grounds generally applicable to the class (failing and refusing to pay interest of any nature on such suspended monies which were paid over to gas royalty owners and producers pursuant to the above opinions), thereby making appropriate . . . declaratory relief with respect to the class as a whole. . ." (K.S.A. 60-223(b)(2), and, in addition or in the alternative,

c. ". . . the question of law or fact common to the members of the class predominate over any questions affecting only individual members, unless it be that of individual arithmetical computations, which as shown by the records is available through Phillips' records, and that a class action is superior to other available means for the fair and efficient adjudication of the controversy." (K.S.A. Supp. 60-223(b)(3).

8) The amount of interest due these plaintiffs from defendant is comparatively small and is alleged and believed to be less than $1,000.00 to each of them and it is further alleged that the average amount due each gas royalty owner or producer of the proposed class is comparatively small and, as a practical matter, most members of the class would have no adequate remedy, due to the size of their claims, if this action did not proceed as a class action.

9) Plaintiff is willing to advance such publication and mailing costs as may be required, but shows to the court that defendant has names and addresses of its royalty owners and producers readily available in its records and that defendant should bear the cost of addressing and mailing notices to its royalty owners that can be inserted along with the mailing of regular royalty checks. Copy of suggested notice is attached.

WHEREFORE, plaintiff prays that upon hearing of this motion the court determine that this is a proper class action involving all of defendant's gas royalty owners and producers to whom defendant accounts affected by FPC Opinions Nos. 699 and 699H, 749 and 749C, and 770 and 770A.

Ginder & Moore
Attorneys at Law
202 South Grand
Cherokee, Oklahoma 73728

Chapin, Penny & Goering
Attorneys at Law
Chapin Building
Medicine Lodge, Kansas 67104
By /s/ W. Luke Chapin
W. Luke Chapin
Attorneys for Plaintiffs

NOTICE OF HEARING

TO DEFENDANT PHILLIPS PETROLEUM COMPANY AND ITS ATTORNEYS OF RECORD:

TAKE NOTICE that the foregoing Motion will be heard by the District Court of Seward County, Kansas, at the District Courtroom, Liberal, Kansas, on the ..... day of ....., 1980, at ..... o'clock a.m.

/s/ W. Luke Chapin
W. Luke Chapin

No. 82-54608-S

IN THE
SUPREME COURT OF THE STATE OF KANSAS

PHILLIPS PETROLEUM COMPANY,
Plaintiff,

vs.

KEATON G. DUCKWORTH, District Judge, 26th Judicial District, IRL SHUTTS and ROBERT ANDERSON and BETTY ANDERSON, Individually and as representatives of all royalty owners and overriding royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds or royalties pursuant to Federal Power Commission Opinion Nos. 699, 699H, 749, 749C, 770 and 770A,
Respondents.

MOTION TO DISMISS PETITION FOR WRIT OF MANDAMUS

COME NOW the above named respondents and move the court for an order quashing and dismissing the Petition for a Writ of Mandamus filed herein for the following reasons:

1) The pleadings show that the order of the District Court complained of is an order determining that the case of Shutts, et al. v. Phillips Petroleum Company, Seward County No. 79-C-113, is a class action pursuant to K.S.A. Supp. 60-223; and such class order is *not* a final order as the statute provides it "may be altered or amended as may be desirable from time to time." (K.S.A. Supp. 60-223(d)(4).)

2) This case is the "second verse" of the "same song". *Shutts I*, 222 K. 527, 567 P.2d 1291, cert. den. 434 U. S. 1068, is an exhaustive opinion on the jurisdiction of Kansas courts over nonresident members of a plaintiff class, particularly in a case such as this where a common fund is involved. This case poses exactly the same jurisdictional questions as *Shutts I*, excepting that beginning with FPC Opinion 699, the commission began rate making nation wide, rather than by area (such as the Hugoton-Anadarko area in *Shutts I*). Therefore, this case, *Shutts II*, involves Phillips royalty owners under leases in the eleven states where the company does business rather than Kansas, Oklahoma and Texas only, as in *Shutts I*. (See *Newberg, Class Actions, Suppl.*, §1206.)

3) Since the order complained of is not a final order, it would not ordinarily be subject to interlocutory appeal, as it would not "materially advance the ultimate termination of the litigation." (Supreme Court Rule No. 4.01.)

4) Where a District Court acts judicially "Mandamus will not lie to control discretion or to revise judicial action . . . nor will mandamus lie even though the party aggrieved has no right of appeal or other remedy to review the action of the court, as the want of such remedy does not of itself entitle the party aggrieved to the extraordinary remedy of Mandamus." (*Railroad Co. v. Shinn*, 60 Kan. 111, 55 Pac. 346; see, also, William M. Ferguson, *Extraordinary Legal Remedies in Kansas*, 2 Washburn Law Review, 17-20; and *State, ex rel. v. Norton*, 20 Kan. 506.)

5) The Petition for Mandamus further shows on its face that the District Court issued the class order based upon mixed questions of law and fact, upon which the right to assume jurisdiction depends and upon which it

is the duty of the District Court to pass judicially; and even though it were assumed that the discretion of the court was erroneously exercised, it cannot under these circumstances be corrected by Mandamus. (52 Am Jur. 2d, *Mandamus,* §312; *Johnson v. Schoch,* 84 Kan. 884, 115 Pac. 638.)

6) The matter complained of by Phillips will be subject to appeal after hearing of the case on its merits. This court "cannot use its original jurisdiction in Mandamus as a substitute for its appellate jurisdiction provided by law." (*Mahoney v. Stavely,* 160 Kan. 792, 165 P.2d 230.)

7) A class order pursuant to K.S.A. Supp. 60-223 and providing for notice, such as entered by the court in this case, is a discretionary order and merely a step in the orderly progress of the case. As such, the order is not ordinarily subject to review by the extraordinary Writ of Mandamus. (Newberg, *Class Actions,* §2182 and §2500 (c).)

8) Petition for the Writ states that Phillips has been advised that counsel for Shutts, et al. do not intend to mail the class notices provided for in the class order of May 21, 1982, until this matter is finally determined. If Phillips obtained that impression from counsel for plaintiffs, it is not true at the present time. The notices, all 33,600 of them, are now being printed, to be mailed on or before June 18, 1982. Procedure for mailing notices in *Shutts II* is different than in *Shutts I,* plaintiffs being required by the court in *Shutts II* to advance the costs of printing and mailing.

9) There is substantial authority opposed to the arguments of Phillips that nonresidents of Kansas, a "nation-

wide class", cannot be included in plaintiff class in this case. The best authorities on the subject are quoted in *Shutts I.*

10) *Feldman v. Bates Mfg. Co.*, 143 N.J. super 84, 362 A.2d 1177, cited in Phillips' brief was distinguished as to the factual situation in *Shutts I* and is also distinguished by the factual situation in *Shutts II.* Phillips continues to cite cases where the concept of jurisdiction over nonresident defendants, rather than over nonresident plaintiff class members, is at issue. (See *International Shoe Co. v. Washington*, 326 U. S. 310, 90 L. Ed. 95, 66 S. Ct. 154, and the many cases following pertaining to nonresident defendants.) In the *Gillette* case, 87 Ill. 2d 7, 428 N.E. 2d 478, opinion attached in full to Phillips Memorandum Brief, at Page A-14, the dissenting Illinois judge distinguishes *Shutts I* from the *Gillette* case on the grounds that: (1) Kansas has jurisdiction of a large portion of the Hugoton-Anadarko area; and (2) Shutts "dovetails nicely into the 'common fund' cases." Likewise, in this case, *Shutts II*, Kansas with its Hugoton field and other gas producing areas, has substantial interest in royalty owners receiving interest on suspense royalties as in *Shutts I*; and this case is exactly like *Shutts I* insofar as the common fund analogy is concerned. (See, also, *Newberg, Suppl.* §1206b.)

11) In fact, it would seem that both the District Court of the 26th Judicial District and the Supreme Court of the State of Kansas would have substantial interest in seeing to it that Phillips adheres to the rulings of *Shutts I* pertaining to payment of interest to its royalty owners on suspense monies held and used, rather than Phillips being allowed to ignore the rulings previously made in *Shutts I.*

WHEREFORE, respondents pray that the request of Phillips for a restraining order and for a Writ of Mandamus be denied; that there be no hearing granted on the Petition for a Writ of Mandamus; and that the Petition filed herein be quashed and dismissed.

W. Luke Chapin
Chapin, Penny & Goering
P. O. Box 148
Medicine Lodge, KS 67104

Ed Moore
Ginder & Moore
202 S. Grand
Cherokee, OK 73728

Harold K. Greenleaf
Smith Greenleaf & Brooks
P. O. Box 296
Liberal, KS 67901
By /s/ W. Luke Chapin
Attorneys for Respondents

AFFIDAVIT OF MAILING

STATE OF KANSAS,

COUNTY OF BARBER, SS:

W. Luke Chapin, of lawful age and being first duly sworn, on oath states:

On June 18, 1982, he mailed in the U. S. mail, postage prepaid, copies of the foregoing Motion as follows:

> Original and nine copies to Lewis Carter, Clerk of Appellate Courts, Kansas Judicial Center, Topeka, Kansas 66612;

Copy to T. L. Cubbage II, Phillips Petroleum Company, Legal Division, Bartlesville, OK 74004;

Copy to Joseph W. Kennedy, Morris, Laing, Evans, Brock & Kennedy, Suite 430, 200 West Douglas, Wichita, KS 67202;

Copy to James R. Yoxall, Light, Yoxall, Antrim & Richardson, Box 1278, Liberal, KS 67901;

Copy to Ed Moore, Ginder & Moore, 202 S. Grand, Cherokee, OK 73728;

Copy to Harold K. Greenleaf, Smith, Greenleaf & Brooks, Box 296, Liberal, KS 67901;

Keaton G. Duckworth, District Judge, Elkhart, KS 67950.

/s/ W. Luke Chapin
W. Luke Chapin

Subscribed and sworn to before me this 18th day of June, 1982.

/s/ Helen Axline
Notary Public

My appointment expires: June 24, 1983.